

DOCUMENT RESUME

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[Overtime Compensation for Sky Marshal Duties]. B-178261. July 7, 1977. 4 pp.

Decision re: Security Officers, United States Customs Service; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Personnel Management and Compensation: Compensation (305).

Contact: Office of the General Counsel: Civilian Personnel.

Budget Function: General Government: Central Personnel Management (805).

Authority: 5 U.S.C. 5545(c)(2). 5 U.S.C. 5542(f). B-151168 (1971). B-180036 (1974). 47 Comp. Gen. 573. John F. Pay et al. v. United States, U.S.D.C., D.C. Burich v. United States, 366 F.2d 984 (Ct. Cl. 1966). Anderson v. United States, 201 Ct. Cl. 660 (1973). Rotgeb et al. v. Staats et al., C.A. No. 4082 (S.D. Ohio 1974).

The Assistant Secretary of the Treasury requested an advance decision with regard to whether Customs Security Officers could be paid their claims for time and one-half overtime, night differential, layover time, and Sunday and holiday pay during the performance of sky marshal duties. Since the overtime was scheduled in advance and recurred at frequent intervals, it could be paid. The claims for night differential and Sunday and holiday pay could also be paid. However, claims for layover time between flights was not allowed. (Author/SC)

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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548**

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Volpe*

**FILE: B-176261**

**DATE: July 7, 1977**

**MATTER OF: Customs Security Officers - Overtime  
Compensation for Sky Marshal Duties**

**DIGEST:** Customs Security Officers, who were not part of the class action lawsuit in John F. Fay et al. v. United States, claim time and one-half overtime, night differential, and Sunday and holiday pay for sky marshal duties performed. Since overtime was scheduled in advance and recurred at frequent intervals, it may be considered "regularly scheduled" and thus compensable under 5 U.S.C. §5542(a). Night differential and Sunday and holiday pay may also be paid. However, claims for layovertime may not be allowed.

This action is in response to the request of September 7, 1976, for an advance decision from the Assistant Secretary of the Treasury (Enforcement, Operations and Tariff Affairs), reference ENF-3-06 CC:H:KG, whether the U.S. Customs Service may pay the overtime claims of certain Customs Security Officers (CSO's) who served as sky marshals in the Federal program to deter airline hijackings from approximately January 1971 to August 1972.

It appears from the record that CSO's were hired and trained specifically for air security duties, and they replaced various other Treasury agents who had been temporarily assigned to sky marshal duties. In February 1971, the Department of the Treasury requested a decision from our Office whether it could pay CSO's premium pay under 5 U.S.C. §5545(c)(2) (1970) for administratively uncontrollable overtime instead of time and one-half compensation under 5 U.S.C. §5542(a) (Supp. V, 1975) for regularly scheduled overtime. After reviewing the facts as presented by the agency, we held that we would not object to a determination by the head of the agency concerned (subject to the approval of the Civil Service Commission) that the hours of duty were uncontrollable for premium pay purposes. B-151168, April 6, 1971. The agency then paid the CSO's premium pay for administratively uncontrollable overtime under 5 U.S.C. §5545(c)(2).

In March 1973, a class action lawsuit was filed on behalf of all CSO's seeking time and one-half overtime, night differential pay, Sunday pay, and compensation for layover time between airline flights. John F. Fay et al. v. United States, U.S.D.C., D.C., Civil Action No. 455-73. The suit was terminated on February 18, 1976, when the parties

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entered into a compromise settlement approved by the court authorizing payment of 75 percent of the plaintiffs' claims for time and one-half overtime and night differential and denying payment of the claims for Sunday and holiday pay and layover time. However, of the potential class of approximately 1,600 CSO's, approximately 120 of them "opted out" of the class action prior to settlement, and it is the entitlement to overtime pay of these 120 or so CSO's that must now be decided.

The agency contends that the compromise settlement in the Fay case does not serve as a basis for concluding that the legal issues have been resolved either favorably or adversely to the United States. In addition, we are not aware of any authority by which the U.S. Customs Service or the Department of the Treasury could offer a settlement or compromise based upon the Fay case to this group of 120 or so CSO's. Therefore, with respect to those CSO's who "opted out" of the class action, the question presented is whether the work performed was "regularly scheduled" as contemplated under 5 U.S.C. §5542(a) or "irregular and occasional" as contemplated under 5 U.S.C. §5545(c)(2).

The agency states, in a supplemental report dated April 14, 1977, that it would have no basis to deny time and one-half overtime to CSO's in light of the fact that both Internal Revenue Service (IRS) agents and Secret Service agents were so paid for comparable inflight overtime. See Rothgeb et al. v. Staats et al., Civil Action No. 4082 (S.D. Ohio 1974) and our decision in Matter of Sky Marshal Program, B-151168, May 25, 1976. In fact, the record before us indicates that the duties performed by CSO's were quite similar to those performed by the IRS and Secret Service agents who were the predecessors of the CSO's in the Sky Marshal Program.

The authority for the payment of time and one-half overtime compensation for "regularly scheduled" overtime is contained in 5 U.S.C. §5542(a) while the authority for the payment of premium pay for "administratively uncontrollable overtime" is contained in 5 U.S.C. §5545 (c)(2). These two forms of compensation are distinct and do not overlap for the same work. See Sky Marshal Program, supra. However, there exists a gray area in distinguishing between whether overtime is "regularly scheduled" or "administratively uncontrollable". As the court stated in the Fay case:

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"In view of the varying approaches the courts have taken in determining whether overtime is regularly scheduled and therefore subject to compensation under 5 U.S.C. §5542(a) (as compared to being administratively uncontrollable pursuant to 5 U.S.C. §5545(c)(2)), the outcome of this issue as a matter of law was far from obvious. See e.g., Burich v. United States, 366 F. 2d 984 (Ct. Cl. 1966); Anderson v. United States, 201 Ct. Cl. 669 (1973); Rothgeb v. Staats, C.A. No. 4082 (S.D. Ohio 1973)." Fay, supra, Order dated February 18, 1976.

Our Office has held in Sky Marshal Program that the "inflight" overtime claimed by the Secret Service agents appeared to be regularly scheduled and, therefore, was compensable at time and one-half rates under 5 U.S.C. §5542. Based upon the record before us in the present case and our holding in Sky Marshal Program, we conclude that the "inflight" overtime performed by the CSO's was regularly scheduled overtime. Compensation previously received by the agents in the form of premium pay for such "inflight" overtime should be offset against payments made in accordance with this decision. In addition, the claims of the CSO's for night differential, Sunday pay, and holiday pay should be paid in accordance with the provisions of 5 U.S.C. §5545(a) and §5546. However, based upon the record before us we cannot find that the layover time constituted hours of work under 5 U.S.C. §5542(a), and claims for layover time may not be paid. See B-180036, May 20, 1974; Aldridge v. United States, 202 Ct. Cl. 365 (1973); and Rapp v. United States, 167 Ct. Cl. 852 (1964). The agency report indicates that such standby or layover time when performed at the duty station, the airport terminal, was credited as working time for administratively uncontrollable premium pay under 5 U.S.C. §5545(c)(2), but when the CSO's were away from the terminal their layover was principally used for personal activities. We agree that no compensation is due for the layover time away from the duty station.

This decision is applicable only to those Customs Security Officers who "opted out" of the class action in Fay since the compromise settlement in Fay operates to bar the claims of all the members of that class action under the principle of res judicata. 37 Comp. Gen. 573 (1968).

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Accordingly, settlement of the claims may be made in the amounts found due in accordance with the discussion above.

  
Deputy Comptroller General  
of the United States